Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network	)	CC Docket No. 88-57

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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Its Attorneys

February 21, 2001

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SUMMARY

Qwest believes that preferential marketing agreements serve the public interest by offering customers more information and more service options. As such, Qwest supports the use of preferential marketing agreements by all telecommunications service providers with one very important caveat -- that these agreements not restrict access to MTEs.

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REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest"), through counsel and pursuant to the Federal Communications Commission's ("Commission") Further Notice of Proposed Rulemaking ("FNPRM"),[1] hereby submits its reply to comments in the above-captioned proceeding concerning competitive local networks.

[1] In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, WT Docket No. 99-217, CC Docket Nos. 96-98 and 88-57, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket

I. INTRODUCTION

Qwest's reply is limited to a single issue: preferential marketing agreements. This reply clarifies Qwest's position on preferential marketing agreements and should correct any misunderstanding that the Commission or any other party may have concerning Qwest's current position.[2]

Qwest will not directly address AT&T Corp.'s ("AT&T") self-serving comments concerning the difficulties that it has encountered with Qwest in gaining access to tenants in multiple tenant environments ("MTE") in the state of Washington.[3] AT&T's assertions represent the "opening shot" in a complaint proceeding before the Washington Utilities and Transportation Commission ("Washington Commission").[4] It should not come as a surprise that Qwest has a significantly different view of the facts and circumstances surrounding access to MTEs in Washington than AT&T.[5] It is not appropriate for the Commission to weigh in on the claims

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No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC 00-366, rel. Oct. 25, 2000, pets. for recon. pending; Order Extending Pleading Cycle, DA 00-2720, rel. Dec. 4, 2000.

[2] See FNPRM ¶ 165; Cypress Communications, Inc. ("Cypress") at 10-11. Both the FNPRM and Cypress' comments are mistaken in their assumption that Qwest was making a statement about marketing agreements between carriers and building owners when it made the following statement in its earlier reply comments: "An arrangement that is not technically "exclusive" may in fact have the practical effect of being exclusive, if the building owner refuses to make the same arrangement available to other carriers." A closer examination of Qwest's reply comments would have revealed that this statement was made in a discussion addressing exclusive building access agreements rather than preferential marketing agreements. Qwest made no reference to marketing agreements in these reply comments. See Qwest Reply Comments, WT Docket No. 99-217, CC Docket No. 96-98, filed Sep. 27, 1999.

[3] AT&T at 10-11.

[4] See id. at Exhibit A.

[5] AT&T's complaint is an attempt both to circumvent the Section 252 arbitration process and to gain an advantage in a pending Section 271 proceeding in Washington. (See Attachment 1,

made by AT&T in an interconnection dispute that is currently being addressed by the Washington Commission.[6]

II. PREFERENTIAL MARKETING AGREEMENTS SERVE THE PUBLIC INTEREST BY PROVIDING CUSTOMERS WITH MORE INFORMATION AND OPTIONS

With few exceptions, commenters endorsed the use of preferential marketing agreements as a means for increasing competition among providers in the delivery of telecommunications service to MTEs.[7] Only AT&T distinguished between competitive local exchange carriers ("CLEC") and incumbent local exchange carriers ("ILEC") in addressing preferential marketing agreements -- supporting the use of such agreements by CLECs but opposing ILEC use as anti-competitive.[8] Qwest has no such qualms and supports the use of preferential marketing

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Qwest's Answer and Affirmative Defenses, UT-003120, filed Nov. 28, 2000; Attachment 2, Qwest's Motion to Amend its Answer to Include a Cross-Complaint for Emergency Relief, UT-003120, filed Dec. 20, 2000; and Attachment 3, Qwest's Motion for Summary Determination, UT-003120, filed Jan. 11, 2001. Many of the injuries that AT&T attributes to Qwest were caused by AT&T's own actions -- in particular, AT&T's refusal to follow the negotiation and arbitration process set forth in the 1996 Act and its insistence on dictating the terms and conditions for access to Qwest facilities (without Qwest's prior agreement). Furthermore, AT&T is not being forthright in its reference to facts surrounding the Washington interconnection dispute. For example, AT&T claims that Qwest "has demanded that AT&T pay a monthly recurring charge of $11.33 per subscriber line merely for using the wiring inside the MTE." AT&T at 11. In answering AT&T's complaint, Qwest admitted that it offered a price of $11.33 per month for the sub-loop portion of the loop inside the MTE. However, Qwest noted that later in negotiations it offered a price of $1.60 per month for this same element. See Attachment 1 at 10. Since then, in the Washington generic cost docket, Qwest further reduced its proposed price for the building cable sub-loop to $0.91 per month. (See Washington Docket UT-003013 (Part B), filed Feb. 7, 2001.)

[6] As such, the Washington Commission will determine whether there is any merit to AT&T's claims.

[7] Coserv, L.L.C. and Multitechnology Services, L.P. ("Coserv") at 8; Sprint Corporation at 10; SBC Communications Inc. at 5; Verizon at 4; Real Access Alliance at 66.

[8] AT&T at 43-46.

agreements by all telecommunications service providers with one very important caveat -- that these agreements not restrict access to MTEs.

As long as preferential marketing agreements do not restrict access to MTEs, customers will be better served with more information and more service options.[9] Both Verizon and the Real Access Alliance question whether the Commission has the authority to regulate marketing agreements as long as such agreements are not tied to building access.[10] Regardless of whether or not the Commission has the legal authority to regulate preferential marketing agreements, the Commission should not attempt to do so. Not only would it be a waste of the Commission's limited resources, as Verizon observes "it would be inconsistent with the Commission's policy of encouraging competition to restrict marketing agreements that contain no access exclusions for carriers within an MTE."[11]

[9] See Coserv at 8. "In short, exclusive marketing agreements encourage competitive facilities deployment while preserving customer choice."

[10] Verizon contends that such marketing agreements are the equivalent of commercial speech and may not be restricted by the Commission without a showing that there is an "overriding government interest." See Verizon at 5-8.

[11] Id. at 5.

III. CONCLUSION

For the foregoing reasons the Commission should neither regulate nor limit the use of preferential marketing agreements in MTEs as long as building access is not constrained.

Respectfully submitted,

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February 21, 2001

ATTACHMENT 1

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Complaint and Request for Expedited Treatment of AT&T Communications of the Pacific Northwest, Inc. Against Qwest Corporation Regarding Providing Access to Inside Wire for AT&T to Provide Local Telephone Service	))))))	No. UT-003120 QWEST'S ANSWER AND AFFIRMATIVE DEFENSES

INTRODUCTION

Qwest Corporation (Qwest) hereby files its answer to the complaint brought by AT&T Communications of the Pacific Northwest, Inc., (AT&T) on November 6, 2000. As will be shown herein, AT&T's complaint does not state a claim upon which relief can be granted, and should be dismissed.

The complaint is essentially a complaint under the Telecommunications Act of 1996 (the Act), alleging that Qwest's proposed terms and prices for access to a particular unbundled network element (UNE) violate the Act and the FCC's requirements. However, the only proceeding in which AT&T may properly seek to resolve this type of dispute under the Act is through a petition for arbitration under §252, or, alternatively, a petition for enforcement of an interconnection agreement if the agreement between the parties already addresses the issues in dispute. Here, it is undisputed that the UNE that AT&T seeks to access is not covered by the

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interconnection agreement between the parties. Further, AT&T has failed to comply with the requirements of the Act to negotiate the issues in good faith, and has failed to comply with the procedural requirements regarding a petition for arbitration.

The complaint, as framed by AT&T, concerns AT&T's access to the inside wire in certain multiple dwelling units (MDUs). As a justification for bringing the complaint before the Commission in the way that it has, AT&T attempts to frame the issue a dispute under state law, citing various provisions of the Revised Code of Washington and the Washington Administrative Code. AT&T states that its complaint is premised on violations of various Washington statutory provisions. However, the cited statutes do not establish any obligation on Qwest to allow access to sub-loop elements and do not confer any rights on AT&T in this context. No relief should be granted under these statutes.

The allegations regarding violations of state law are a sham to conceal the true basis for the dispute. AT&T's own introduction to the Complaint shows very clearly that it premises its asserted rights in this complaint on the provisions of the Act and various FCC orders. Indeed, the second sentence of the complaint states that AT&T has been attempting to obtain access "*as mandated by the Telecommunications Act of 1996* . . . ." (emphasis added).

AT&T does not formally cite the Act as a basis for relief, nor does it reference any portion of the interconnection agreement between the parties. AT&T's failure to do so speaks volumes. AT&T knows full well that the Act and the FCC's order require it to negotiate and then arbitrate, under section 252 of the Act, the type of dispute it now seeks to have the Commission resolve outside of that arbitration process. The Commission should summarily reject AT&T's attempt to do an end run around the requirements of the Act.

The real issue raised by the complaint is the dispute between Qwest and AT&T regarding the terms and conditions, as well as the prices, for sub-loop unbundling. Sub-loop unbundling,

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as mandated by the FCC in its UNE Remand Order, requires Qwest to allow access to its loop plant at technically feasible points within its network. One of these points may be the building terminal, generally a box on the outside of an MDU. As will be described in more detail in the numbered paragraphs to follow, there are certain network configurations where Qwest's loop plant extends all the way into the building and terminates inside each individual customer unit. It is those circumstances in which the issues raised in the complaint arise. However, the FCC has clearly held that disputes on these issues must be resolved in the context of an arbitration proceeding under the Act. (UNE Remand Order at ¶¶ 223, 229).

This Commission considered a similar complaint, almost three years ago, and decided that the rights and obligations of the parties were established by the interconnection agreement in effect between the parties at the time, and that disputes should be resolved by arbitration, not complaint. In *MCImetro Access Transmission Services, Inc., v. U S WEST Communications, Inc.*, Docket No. UT-971158, the Commission rejected MCI's claim that U S WEST was obligated under state law to accept test orders for UNEs when MCI's interim interconnection agreement did not contain terms and conditions addressing test orders. (Order Granting Motion for Summary Determination, February 19, 1998). In that proceeding, MCI filed a complaint against U S WEST, alleging, much as AT&T does here, that it had an independent statutory entitlement under various provisions of state law to have U S WEST perform in a certain manner.

MCI cited many of the same provisions in support of its claim that AT&T does here, including RCW 80.04.110 (complaints); 80.36.080 (adequate and sufficient facilities); 80.36.140 (Commission may order adequate and sufficient facilities); 80.36.170 (Commission may remedy undue preference or advantage); 80.36.186 (Commission may order access on equal terms); and 80.36.260 (Commission may order betterments). The Commission acknowledged these statutory

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provisions, and noted that its important powers under those statutes were not diminished by the Commission's policy that the respective rights and obligations of parties seeking interconnection of their networks should be controlled by a contract. The Commission further stated that disagreements over the details of interconnection agreements should be resolved through arbitration consistent with Section 252 of the Telecom Act. (*See,* Order Granting Motion for Summary Determination, page 7).

The timing of AT&T's complaint and request for expedited relief is somewhat curious. AT&T knows full well that all the issues it raises are already slated for consideration in both the §271 proceeding, and in the generic cost proceeding. Indeed, AT&T has already filed over 30 pages of testimony addressing this issue in Docket No. UT-003013, has already raised this issue in connection with checklist items #3 (access to rights-of-way) and #1 (collocation) in the 271 proceeding, and has every ability to pursue the issue in connection with checklist item #4, loops and sub-loops. Clearly, AT&T seeks to gain some advantage in one or both of those proceedings by attempting to obtain an expedited declaratory ruling in this case. The Commission should not allow AT&T to circumvent the process in that way.

In the days and weeks prior to the complaint being filed with the Commission, the parties met and negotiated about various aspects of access to sub-loop elements in MDUs. The last senior-level correspondence from AT&T to Qwest regarding its concerns related to access to inside wire (i.e., the sub-loop element within a multiple dwelling unit) was an October 27, 2000 letter from Greg Terry, AT&T Regional Vice President Local Services and Access Management to Beth Halvorson, Qwest Vice-President – Major Markets. In that letter AT&T asked Qwest to respond to its demand for direct access to Qwest's building terminals no later than November 1, 2000. Qwest provided a written response as requested. Nevertheless, AT&T proceeded to file its complaint on November 6, 2000, with no further discussion of the issues. Clearly, AT&T's

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October 27, 2000 letter was drafted with full knowledge and intent that a complaint would follow, and not in any good faith effort to negotiate a resolution to the issues between the parties.

With regard to the merits of the complaint, Qwest believes the allegations to be without foundation. Qwest strongly denies that it has acted in a way that is unlawfully discriminatory or preferential. The terms and the prices that Qwest offered for access to MDUs are consistent with the Act and the FCC's orders. Qwest believes that the parties were making progress in the negotiations on the issues raised in this complaint, and that the parties had a good chance of reaching an agreement if AT&T had continued to negotiate in good faith. Indeed, Qwest believed that it had reached a number of interim agreements with AT&T operational personnel, only to have those agreements pulled back by AT&T's senior management. Nevertheless, consistent with the requirements of the Act, the parties were negotiating, and had AT&T not violated the Act by breaking off negotiations and filing this complaint, may have reached an interim or even a final resolution.

Finally, Qwest urges the Commission that expedited treatment of the complaint is unwarranted. AT&T was before the Commission just over a year ago, demanding expedited treatment of its complaint in Docket No. UT-991292. After unreasonably demanding an expedited schedule, AT&T proceeded to burden the Commission and the parties with largely ill-founded discovery disputes. Further, AT&T refused to cooperate with the Commission when the Commission placed conditions on AT&T regarding an expedited procedural schedule. Finally, after considerable resources were expended by U S WEST and the Commission to accommodate AT&T's insistent demand for an expedited hearing, AT&T utterly failed to meet its burden of proof, and its complaint was dismissed by the Commission. Needless to say, even if the complaint had merit, which it does not, the Commission should view AT&T's claim for expedited treatment with skepticism, given AT&T's recent history.

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ANSWER

Answering the numbered paragraphs in AT&T's Complaint, Qwest states as follows:

Except as otherwise expressly pleaded, Qwest denies each and every allegation in the complaint.

PARTIES

1. Qwest admits the allegations in paragraph 1. Qwest admits the allegations in the first sentence of paragraph 2, and admits that its principle place of business in Washington is located at 1600 – 7th Ave., Seattle. Qwest denies the remainder of paragraph 2.

JURISDICTION

2. Paragraphs 3 through 5 of the complaint assert legal conclusions to which no responsive pleading is required. Nevertheless, Qwest affirmatively states that AT&T incorrectly predicates its allegations of jurisdiction on some Washington statutes and rules which do not confer such jurisdiction, nor authorize the relief requested. Qwest further states that certain cited provisions such as "WAC 80-36-300" do not exist. With regard to the correctly identified statutes and rules, Qwest states that the provisions of Washington law speak for themselves and Qwest denies all allegations inconsistent with Washington statutes or rules.

3. Specifically with respect to access to unbundled network elements under the Telecommunications Act of 1996, the interconnection agreement between the parties, as well as the applicable provisions of federal law and the FCC's rules control Qwest's obligations. Qwest believes that the only issue raised by the complaint is whether AT&T has an interconnection agreement addressing access to MDUs that it seeks to enforce. If it does not, then the complaint must be dismissed. Such an outcome is consistent with a prior Commission decision, as the Commission has already had occasion to rule on a similar claim by another carrier. (See the discussion re *MCImetro v. U S WEST* above).

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FACTUAL ALLEGATIONS

4. Qwest is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first three sentences of paragraph 6, and therefore denies those allegations. With regard to the last two sentences of paragraph 6, Qwest states that its tariff WN U-31 is no longer an effective tariff, and was not effective on the date the complaint was filed. Qwest's tariff WN U-40 was effective August 30, 2000. Section 2.8.1 contains a description of, and terms and conditions for, "intra-premises network cable and wire". Sub-section B.5. sets forth options that a building owner has for terminating Qwest's network facilities in a multi-tenant building. The option selected determines where Qwest's regulated facilities (i.e., the loop to the customer) end and where the customer-owned facilities (i.e., inside wire) begin. In an "option 1" building, the building owner has opted to have Qwest's regulated facilities terminate at the point of entry into the property or the building. Facilities beyond that point within the building are owned and maintained by the building owner and are properly referred to as "inside wire". In an "option 3" building, the building owner has opted to have Qwest's regulated facilities terminate within the building at each customer unit. Thus, facilities that are "inside wire" in an option 1 building remain a part of Qwest's loop plant in an option 3 building. "Inside wire" in an option 3 building refers only to that portion of the facilities on the customer side of the standard network interface (SNI) within each individual customer unit.

5. Qwest denies the allegations contained in paragraph 7. Qwest denies that paragraph 7 purports to contain a description of the proper way to in which a company could access Qwest's loop facilities at the building terminal. Qwest admits that the first sentence of paragraph 7 contains a description of how AT&T would like to access Qwest's building terminals, but states that access in that manner would damage Qwest's network, could put other customers out of service, and could operate to deny access to other carriers. The description of

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AT&T's proposed method of access is what is referred to as a "hard connection". Qwest submits that it is improper from a network design and engineering standpoint to perform hard connections in a building terminal. The proper way in which AT&T may access the loop plant in option 3 buildings is via a cross-connect box, as set forth in Qwest's proposal to AT&T.

6. Qwest denies the allegations contained in paragraph 8. Qwest does not believe that AT&T informed it of its "protocol" for access, nor is it relevant if AT&T did. The simple fact of the matter is that what AT&T is requesting is access to Qwest's loop plant, specifically the sub-loop portion, at the building terminal. Access to sub-loop elements is not governed by AT&T's unilateral decree about "its protocol", but rather is authorized by the FCC's UNE Remand Order and should be governed by the terms and conditions of the interconnection agreement between the parties.

The current interconnection agreement between the parties does not contain terms and conditions for sub-loop access, nor does it contain prices. Qwest offered AT&T an amendment to the agreement to incorporate terms and conditions on August 28, 2000, but AT&T has not signed the amendment. Qwest has also negotiated these issues with AT&T since August, and believed that the parties were making considerable progress, especially on interim prices. However, the determinative fact in this case is that AT&T has not sought to enforce an existing interconnection agreement, nor has it sought to arbitrate a dispute with regard to a new term in an interconnection agreement.

7. Qwest is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9, and therefore denies those allegations. Qwest admits that it sometimes places padlocks on certain building terminals.

8. Qwest is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10, and therefore denies those allegations. With

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regard to the cited FCC orders and decision of the Georgia Public Utilities Commission, Qwest states that those orders speak for themselves and Qwest denies any allegations inconsistent with those orders.

9. With regard to the allegations in paragraph 11, Qwest admits that on or about July 24, 2000 it received a letter from an AT&T attorney threatening to resort to self-help, and to remove padlocks on certain building terminals, unless Qwest would remove the locks or provide "AT&T Broadband" with the keys.

10. Qwest admits the allegations contained in paragraph 12. Access to the sub-loop within a building is not addressed in any agreement between the parties. Nevertheless, Qwest was willing to negotiate the issue with AT&T. On August 22, 2000, AT&T stated that it was willing to amend the interconnection agreement between the parties to reflect access to sub-loop elements. On August 28, 2000 Qwest provided AT&T with a proposed "Sub-loop Amendment" to the interconnection agreement between the parties. AT&T has never signed that amendment.

11. Qwest denies the allegations in paragraph 13 of the complaint, except as set forth herein. Qwest states one of its technicians did in fact remove conduit that AT&T had unlawfully placed into Qwest's building terminal boxes at the Hideaway Apartments in Bellingham. There were no wires in the conduit, and no customers being served at the time the conduit was removed. Thus, it is incorrect to characterize the removal of the conduit as an act that "disconnected" the conduit. Qwest did post stickers on the building terminals identifying them as Qwest property. AT&T had vandalized Qwest's property, and Qwest acted lawfully to remove the unauthorized placement of conduit that was accomplished by AT&T drilling into Qwest's building terminal boxes and jeopardizing service to all the customers in the apartment complex.

12. Qwest admits the allegations contained in paragraph 14, except as set forth herein. Qwest admits that it did not provide AT&T notice that it would remove the conduit (there were

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no wires in the conduit) because Qwest did not know that AT&T had trespassed on Qwest's property. The trespass was discovered by a technician who was at the premises for another purpose. Qwest does not know how AT&T became aware that the conduit had been removed.

13. Qwest admits the allegations contained in paragraph 15, except as set forth herein. Qwest denies that AT&T's characterization of the issue as a "disconnection" issue is proper. Additionally, Qwest denies that its actions halted AT&T's ability to provide local service or to participate in the market. AT&T has failed and refused to comply with the requirements of the Telecommunications Act and the FCC's rules regarding access to sub-loops, and it is this failure and refusal that has prevented AT&T from gaining lawful access to Qwest's sub-loops, which Qwest has at all times been ready to provide.

14. Qwest denies the allegations contained in paragraph 16, except as set forth herein. In paragraph 16, AT&T sets forth a description of the first offering that Qwest made to AT&T in the process of trying to negotiate terms, conditions, and pricing for access to sub-loops. It is correct that in Qwest's network, the building terminal configuration is similar or the same in an "option 1" building as in an "option 3" building. It is also correct, as set forth in the second sentence of that paragraph, that Qwest does not dispute the manner in which AT&T access cable in an option 1 building. What AT&T fails to mention is that in option 1 buildings, AT&T has placed a "common box". This "common box" or third box, is a terminal box in addition to the Qwest box and the AT&T box, and allows access for purposes of cross connecting and moving service from one provider to another. Qwest also proposes a "common box" for option 3 buildings, which would allow access by all providers, and would not jeopardize service to existing customers.

Qwest agrees that the bullet points set forth in paragraph 16 generally (though not always accurately) describe the terms offered by Qwest in the first discussions the parties had. However,

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AT&T fails to capture or describe the subsequent negotiations that occurred. For example, although Qwest's standard offering for a field connection point contained a provisioning interval of up to 150 days, Qwest thereafter agreed to a much shorter interval of 30 days for the MDU access at issue here. Additionally, the AT&T account team offered to "hand hold" an initial application, asking AT&T to place a trial order to test the process flow. AT&T refused this offer. Finally, Qwest never represented that special construction would occur, as set forth in the complaint, "at Qwest's leisure".

15. Answering paragraph 17 of the complaint, Qwest is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in that paragraph, and Qwest therefore denies those allegations.

16. Answering paragraph 18 of the complaint, Qwest admits that early on in the negotiations between the parties it offered a price of $11.33 per month for the sub-loop portion of the loop which is inside the MDU. AT&T rejected this offer. Qwest is unaware of the prices that other ILECs have proposed for this element. Later on in the negotiations, Qwest offered to accept a price of $1.60 per month for the same element, subject to true up. AT&T also rejected this offer.

17. Answering paragraph 19 of the complaint, Qwest denies the allegations in that paragraph. That paragraph mischaracterizes the discussions between the parties. Qwest offered a number of options to AT&T. Qwest did state that the building owner has the option of converting an option 3 building to an option 1 building. Such a conversion would involve purchase of the wiring inside the building, if the building was constructed after 1994. If the building was constructed prior to 1994, the conversion would be at no cost to the building owner. Qwest specifically offered to provide AT&T with price quotes for conversion from option 3 to option 1 if AT&T were to provide Qwest with a specific building address for which a quote was

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desired. AT&T never did so. At all times Qwest stood ready to continue negotiations with AT&T on this issue. Qwest did not improperly ask AT&T to divulge confidential information, and will treat AT&T confidential information consistent with the Act and the interconnection agreement between the parties.

18. Answering paragraph 20 of the complaint, Qwest admits that on September 27, 2000, AT&T sent Qwest a letter threatening a complaint with the Commission. Qwest denies that the parties had only been negotiating for two weeks on these issues, or that the negotiations have been "fruitless".

19. Answering paragraph 21 of the complaint, Qwest admits the first sentence in that paragraph, but denies that it promised to meet AT&T's demands. Qwest merely agreed and intended to continue to negotiate with AT&T, in an effort to resolve the issues without redress to the Commission via a petition for arbitration, which is the only legitimate remedy AT&T could seek.

20. Answering paragraph 22 of the complaint, Qwest admits that it did provide a revised written proposal to AT&T on October 6, 2000, including a proposal for a "common box". That proposal speaks for itself, and Qwest denies any allegations inconsistent with the terms of the proposal. Qwest does not know what additional costs AT&T would incur if the common box proposal were implemented, nor does Qwest know whether those costs, if any, would make the proposal "prohibitively costly" to implement.

21. Answering paragraph 23 of the complaint, Qwest denies that its proposal was contrary to any applicable FCC requirements.

22. Answering paragraph 24 of the complaint, Qwest denies the characterizations contained in that paragraph, but admits that it did forward another proposal to AT&T on October 23, 2000. Such proposal was consistent with Qwest's ongoing obligation to negotiate the

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disputed issues between the parties. Qwest states that the details of the proposal speak for themselves, and Qwest denies any allegations inconsistent with the actual proposal it sent to AT&T.

23. Answering paragraph 25 of the complaint, Qwest denies that AT&T had no alternative but to seek Commission relief in the form of a complaint, or that Qwest's actions caused AT&T damage in any way. Under the Act, and under the FCC's specific requirements regarding access to sub-loop elements, Qwest and AT&T are required to negotiate their differences for at least 135 days. (Qwest has, at all times, been willing to do so, and has changed its position in a way that was favorable to AT&T on many issues.) After the 135th day, and before the 160th day, either party may petition for arbitration of any disputed issues under section 252 of the Act. However, AT&T has failed and refused to continue to negotiate in good faith for the required time period. If one assumes that negotiations began in July, with AT&T's first letter demanding access, the 135th day falls sometime in December 2000. If one assumes, more realistically, that negotiations began in August, when the parties actually exchanged proposed language, the arbitration window does not open until sometime in January 2001. Yet AT&T filed a complaint on November 6, 2000. AT&T is demanding relief to which it is not entitled

CAUSES OF ACTION

Count I: Unreasonable Advantage/Unfair Competition

24. Answering paragraph 26 of the complaint, Qwest incorporates its admissions and denials to paragraphs 1 through 25 as if fully set forth herein.

25. Answering paragraphs 27 and 28 of the complaint, Qwest states that the cited provisions of the Revised Code of Washington speak for themselves, and Qwest specifically denies any allegations that are inconsistent with the provisions of those statutes. Qwest specifically denies that it is subjecting AT&T to any prejudice or disadvantage which is

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actionable under state law absent an interconnection agreement between the parties addressing the issue. AT&T has neither alleged nor established that it has any state law right to access MDUs in the manner it requests, or that state law even confers a right of access at all. As such, because AT&T's claims are premised on rights conferred by the Act and the FCC's rules, AT&T must show that it is entitled to relief under the Act or the FCC's rules. It has not made that showing.

26. Answering paragraph 29 of the complaint, Qwest denies that AT&T or any consumers are harmed by Qwest's actions, which are entirely consistent with its obligations under the Act, the FCC's rules, and the interconnection agreement between the parties.

Count II: Failure To Reasonably Furnish Telecommunications Services

27. Answering paragraph 30 of the complaint, Qwest incorporates its admissions and denials to paragraphs 1 through 29 as if fully set forth herein.

28. Answering paragraph 31 of the complaint, Qwest admits that the FCC's UNE Remand Order addresses the issue raised in this complaint. Qwest further states that the UNE Remand Order, and paragraphs 223 and 229, among others, directs the parties to section 252 arbitration to resolve disputes arising with regard to these issues.

29. Answering paragraphs 32, 33, and 34 of the complaint, Qwest states that the cited provisions of Washington law speak for themselves, and Qwest denies any allegations inconsistent with those provisions. Qwest specifically denies that access to option 3 wire inside the MDU is a telecommunications service, or that the cited provisions of the law are applicable to this case.

30. Answering paragraph 35 of the complaint, Qwest denies that it has failed to furnish telecommunications service, or that AT&T or any consumers are harmed by Qwest's

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actions, which are entirely consistent with its obligations under the Act, the FCC's rules, and the interconnection agreement between the parties.

Count III: Unlawful Preference

31. Answering paragraph 36 of the complaint, Qwest incorporates its admissions and denials to paragraphs 1 through 35 as if fully set forth herein.

32. Answering paragraph 37 of the complaint, Qwest denies that RCW 80.36.186 applies to the issue raised in this complaint.

33. Answering paragraph 38 of the complaint, Qwest denies that access to the sub-loop UNE in the MDU is a telecommunications service, and denies that RCW 80.36.310 and RCW 80.36.320 are applicable to the issues raised in this complaint.

34. Answering paragraph 39 of the complaint, Qwest denies the allegations in that paragraph.

35. Answering paragraph 40 of the complaint, Qwest denies that AT&T or any consumers are harmed by Qwest's actions, which are entirely consistent with its obligations under the Act, the FCC's rules, and the interconnection agreement between the parties. Qwest is without knowledge or information sufficient to form a belief as to whether AT&T can operate profitably at the prices Qwest proposes for access to MDUs, and Qwest therefore generally denies the allegation to that effect in paragraph 40 of the complaint.

Count IV: Injury to Property

36. Answering paragraph 41 of the complaint, Qwest incorporates its admissions and denials to paragraphs 1 through 40 as if fully set forth herein.

37. Answering paragraphs 42 and 43 of the complaint, Qwest denies the allegations in those paragraphs. Qwest further states that AT&T has willfully and intentionally destroyed Qwest's telecommunications facilities when it drilled into Qwest's building terminals to insert

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conduit and to access Qwest's wires. AT&T's actions caused at least one Qwest customer to lose service for a period of time, and required Qwest to dispatch a technician to repair the damage.

PRAYERS FOR RELIEF

38. AT&T requests that the Commission, in an expedited manner, grant 8 separate requests for relief. These requests should be denied. As set forth elsewhere in this answer, AT&T has failed to state a claim upon which relief can be granted. As such, none of the 8 requests for relief is supported by the complaint. As to each of the prayers for relief, to the extent that AT&T requests the Commission to order performance or impose requirements with regard to matters which are subject to arbitration under the Act, the Commission lacks jurisdiction to do so in a complaint proceeding. Further, because AT&T has failed to comply with the requirements of the Act regarding a petition for arbitration, this complaint cannot be converted into an arbitration proceeding under the Act.

39. AT&T asks the Commission to "issue a declaratory order pursuant to RCW 80.36.186, RCW 80.36.170 and WAC 480-09-230" that Qwest's actions with regard to option 3 access "constitutes unreasonable advantage and unfair competition causing AT&T undue and unreasonable prejudice."

This request should be denied. There is no basis upon which to issue a declaratory order, and AT&T's complaint does not set forth the necessary allegations to form a basis for the issuance of such an order. That procedural impropriety aside, Qwest's actions with regard to access to option 3 wiring are consistent with its obligation under the Act and the FCC's rules to allow such access, and to negotiate, in good faith, the terms, conditions, and prices of that aspect of an interconnection agreement between the parties.

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40. AT&T asks the Commission to "issue a declaratory order pursuant to RCW 80.36.080, RCW 80.36.090, WAC 480-120-051 and WAC 480-09-230 that Qwest has failed to provide telephone services in a prompt and efficient manner".

This request should be denied. Access to option 3 wiring is not governed by any of the cited provisions of the law. Access to option 3 wiring is not a "telephone service". Access to option 3 wiring is access to an unbundled network element (UNE) under the Act. Qwest has offered AT&T access to that UNE, but AT&T has rejected Qwest's offer and has refused to continue good faith negotiations under the Act.

41. AT&T asks the Commission to "issue a declaratory order pursuant to RCW 80.36.186 and WAC 480-09-230" that Qwest's practice of "creating functional and cost barriers" constitutes giving itself and its affiliates an unreasonable preference by unreasonably disadvantaging AT&T and its current and potential customers.

The Commission should deny this request. Qwest has not created any functional or cost barriers. Further, to the extent that AT&T disagrees with Qwest's prices or terms and conditions, AT&T is obligated under section 252 of the Act to negotiate the disagreement, and may then file for arbitration under the statutory timeline. Since AT&T has failed to comply with its obligations under the Act, it has not shown that it is entitled to any relief. Qwest does not prefer itself or its affiliates by asking AT&T to comply with its obligations under the Act and the FCC's rules.

42. AT&T asks the Commission to require, pursuant to RCW 80.36.140, RCW 80.36.260, and WAC 480-120-016, Qwest to allow access to option 3 wiring as mandated by the FCC's Third Report and Order (the UNE Remand Order) on the terms and conditions that AT&T desires.

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This request should be denied. Here, finally, AT&T appears to acknowledge that its right to access option 3 wiring is a right granted under the UNE Remand Order. However, AT&T continues to cheerfully disregard the requirements of paragraphs 223 and 229 of that order. Both of those paragraphs reference the arbitration procedures under section 252 of the Act as the way that parties will resolve differences over access to sub-loops.

43. AT&T asks the Commission, under the authority granted in RCW 80.36.140 and WAC 480-120-016, to require Qwest to reduce its cost of access to option 3 wire to a just and reasonable figure. This request should be denied for the reasons set forth in paragraph 42 above.

44. AT&T asks the Commission, under the authority granted in RCW 80.36.380, to assess penalties against Qwest for each wire that Qwest has denied access to AT&T. The Commission should deny this request. Qwest has not denied AT&T access. Further, penalties may only be assessed for violation of a Commission law, rule, or order. No such violation is shown in this case, and no penalties may be assessed.

45. AT&T asks the Commission, under the authority granted in RCW 80.36.070, to assess damages against Qwest , to assess damages against Qwest for the "destruction and disabling" of AT&T conduit and wire.

46. AT&T asks the Commission to provide any other relief the Commission deems necessary and proper, under WAC 480-120-016. WAC 480-120-016 is the "saving clause" in the rules and confers no separate or additional authority on the Commission that the Commission does not have under other statutory provisions. No relief is warranted under this rule, or any other statutory or regulatory provision. The Commission should dismiss the complaint with prejudice.

AFFIRMATIVE DEFENSES

1. AT&T's complaint fails to state a claim upon which relief can be granted.

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2. AT&T Communications of the Pacific Northwest lacks standing to bring this complaint. AT&T Communications of the Pacific Northwest is not the party seeking access to Qwest's building terminals. The company seeking access is AT&T Broadband. AT&T Broadband is not the complainant herein nor does it have an interconnection agreement with Qwest.

3. The actions that AT&T complains of herein are not governed by state law. AT&T has no right to access the sub-loop portion of Qwest's loop plant under any provision of state law. Access to sub-loop elements is not a "telecommunications service" under Washington law.

Sub-loop access is authorized and governed by the Telecommunications Act of 1996, and applicable FCC rules. The FCC has specifically determined that disputes regarding prices or terms and conditions of access to sub-loops are to be arbitrated by the state Commission under Section 252 of the Act. The interconnection agreement currently in effect between the parties does not contain terms and conditions regarding access to sub-loops. Qwest offered AT&T an amendment to the interconnection agreement on August 28, 2000 to include those terms and conditions, and has been willing to negotiate this issue at all times.

4. AT&T's claims are barred by the doctrine of unclean hands.

5. Qwest's removal of AT&T's conduit was permitted because AT&T had trespassed on Qwest property, had vandalized Qwest's building terminals, and had unlawfully placed the conduit. AT&T's actions in unlawfully accessing Qwest's building terminals placed at least one Qwest customer out of service.

6. AT&T's actions violate RCW 80.36.070.

7. To the extent that AT&T has asked for a declaratory ruling, Qwest does not consent to entry of a declaratory order under RCW 34.05.240(7).

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8. To the extent to which AT&T has suffered any injury, that injury is the result of AT&T's own conduct.

9. To the extent to which AT&T has suffered any damages, AT&T has failed to mitigate such damages.

10. AT&T's complaint cannot be converted into a petition for arbitration under the Act, as it is legally and procedurally deficient, and does not comply with section 252.

DATED this 28th day of November, 2000.

Qwest Corporation

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ATTACHMENT 2

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., Complainant, v. QWEST CORPORATION, Respondent	)	Docket No. UT-003120 QWEST'S MOTION TO AMEND ITS ANSWER TO INCLUDE A CROSS-COMPLAINT FOR EMERGENCY RELIEF

Qwest Corporation (Qwest) hereby moves the Commission for leave to amend the answer that Qwest filed on November 28, 2000. Such a motion may be made and granted pursuant to WAC 480-09-425(5), which allows pleadings to be amended at any time upon such terms the Commission finds to be lawful and just. The motion would, if granted, amend the answer and affirmative defenses to include a cross complaint for emergency relief as set forth herein.

1. Request for Emergency Relief – Pursuant to RCW 34.05.479 and WAC 480-09-510, the Commission is authorized to use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare. Qwest asserts that such a

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situation has been shown to exist by virtue of facts set forth in Qwest's answer, and the additional facts set forth herein, and in the attached Declaration of Jeffrey Wilson.

2. As set forth in Qwest's answer to AT&T' complaint, AT&T, and/or AT&T Broadband is seeking access to Qwest's building terminals in order to access the sub-loop in multiple dwelling units (MDUs). Qwest has offered such access on various terms and conditions that, to date, have not been acceptable to AT&T. Some of these building terminal boxes are padlocked, others are not.

3. Recently, AT&T has undertaken to access the building terminals without agreement by Qwest, and has undertaken such access on terms and conditions which are not acceptable to Qwest. Most importantly to this complaint, AT&T's actions have jeopardized the integrity of Qwest's network, have jeopardized service to all customers within the MDU, and have placed customers out of service. It is this latter circumstance that Qwest is asking the Commission to act on.

4. AT&T's actions have and will continue to put Qwest customers out of service. This occurs when AT&T breaks into Qwest's building terminals and connects a former Qwest customer to AT&T's network. AT&T refuses to follow the Qwest recommended protocol of using a field connection point (FCP) and instead makes a "hard connection" to transfer the customer. This "hard connection", done within the confines of the relatively small, full, terminal box, places all customers at an increased risk of having their service disconnected when and if the AT&T technician cuts the wrong wire, or makes an incorrect connection.

5. Qwest believes that such out of service conditions have in fact been caused by AT&T, as set forth in the attached declaration of Jeff Wilson. Qwest believes that AT&T's

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unauthorized access to its terminal boxes is the direct and proximate cause of at least three customers being placed out of service within the past six weeks in Bellingham alone. Such action by AT&T poses a completely unnecessary risk to the public safety and welfare by creating unpredictable service outages for customers.

6. The Commission can and should put a halt to this threat by ordering AT&T to cease and desist its activities at once, unless and until the parties are able to agree upon a reasonable protocol for interim access while the complaint is being resolved.

Respectfully submitted this 20th day of December, 2000.

Qwest Corporation

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ATTACHMENT 3

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T Communications of the Pacific Northwest, Inc.,	)	DOCKET NO. UT-003120
Complainant,	)	QWEST'S MOTION FOR SUMMARY DETERMINATION
vs.	)	
Qwest Corporation,	)	
Respondent.	)	

I. RELIEF REQUESTED

Qwest Corporation (Qwest) hereby brings this motion for summary determination pursuant to WAC 480-09-426(2). That rule provides that a party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor.

In considering a motion made under WAC 480-09-426(2), the Commission will consider the standards applicable to a motion made under Civil Rule 56 of the Civil Rules for Superior Court. CR 56 is the summary judgment rule. CR 56(b) provides that a party against whom a

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claim is asserted may move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof. Summary judgment is appropriate where, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); see also Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990).

The Commission must view the evidence in a light most favorable to a non-moving party; however, the non-moving party may not rely upon speculation or on argumentative assertions that unresolved factual issues remain. White v. State, 131 Wn.2d 1, 7, 929 P.2d 396 (1997). A mere scintilla of evidence is not enough to establish the existence of a material fact; rather, a party must set forth specific facts which disclose the existence of a material fact. Id. at 22-23. When there are no factual issues and the dispute can be resolved by answering questions of law, as in the present case, summary judgment is favored as an important part of the process of resolving the dispute. Id. at 6. Qwest asks the Commission to consider the pleadings in this matter together with the exhibits appended hereto in its determination of this motion.

II. STATEMENT OF THE FACTS

Qwest and AT&T Communications of the Pacific Northwest, Inc. (AT&T) are both registered telecommunications companies under Washington law. AT&T filed its formal complaint in this matter on November 6, 2000. At that time, and at all times material to any of the allegations raised in the complaint, the relationship between Qwest and AT&T was governed by an arbitrated Interconnection Agreement dated July 24, 1997. That agreement was effective for a stated term of three years, through July 24, 2000, and continues in effect thereafter on a month-to-month basis. The AT&T agreement is attached hereto as Exhibit A.

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Additionally, AT&T has acquired TCG Seattle (TCG). TCG and Qwest were also parties to an interconnection agreement, and AT&T is apparently conducting its operations under the TCG agreement, as indicated in the letters referred to below as Exhibits C and D. The TCG agreement is dated January 29, 1997, and is also now on a month-to-month basis. The TCG agreement is attached hereto as Exhibit B.

The interconnection agreement(s) currently in effect between Qwest and AT&T do not contain terms and conditions governing access to the building cable in multiple dwelling units (MDUs) as described in AT&T's complaint. No sub-loop elements are identified as separately available in the AT&T Agreement, nor are there prices set forth for sub-loop elements. The AT&T agreement references loops in Attachment 3, Section 8. Unbundling of sub-loop elements is addressed in Section 8.1.1.1, which provides that:

> AT&T may purchase Loop and NID on an unbundled basis. AT&T shall use the BFR process set forth in Part A of this Agreement to request unbundling of Loop Concentrator/Multiplexer, Loop Feeder and Distribution.

Part A of the Agreement, Section 48, contains the arbitrated provisions regarding the BFR (bona fide request) process. The requirements for initiating a BFR are contained in Section 48.3, as follows:

> 48.3 A Request shall be submitted in writing and, at a minimum, shall include: (a) a complete and accurate technical description of each requested Network Element or Interconnection; (b) the desired interface specifications; (c) a statement that the Interconnection or Network Element will be used to provide a Telecommunications Service; (d) the quantity requested; (e) the location(s) requested; and (f) whether AT&T wants the requested item(s) and terms made generally available. AT&T may designate a Request as Confidential.

AT&T has clearly disregarded the BFR provisions of its Agreement, and has not complied with the process set forth in that Agreement with regard to its request for access to MDU building cable.

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The TCG Agreement, under which AT&T is conducting its operations, contains no references whatsoever to the provision of sub-loops or MDU building cable.

It is clear that the agreement(s) contain no provisions regarding access to the building cable in MDUs or the provision of this sub-loop element. However, during the period of time from July 2000 until the filing of the complaint, AT&T and Qwest were engaged in negotiations regarding this issue as required by the Telecommunications Act of 1996. Those negotiations focused on the terms and conditions for access to the sub-loop element which is the MDU building cable, as well as the pricing.

AT&T has acknowledged that the interconnection agreement between the parties must be amended to incorporate terms and conditions for access to sub-loops. On August 22, 2000, AT&T sent Qwest a letter stating that it was willing to amend the TCG interconnection agreement, and proposing an amendment. The letter is attached hereto as Exhibit C.

On August 28, 2000, Qwest responded to AT&T's proposed amendment with a counter proposal. Qwest supplied AT&T with amendments to the interconnection agreement to include new terms and conditions for access to the NID, and to incorporate a new section regarding access to sub-loops. Qwest's letter and proposed amendments are attached hereto as Exhibit D.

AT&T never provided Qwest with a different formal proposal in response to Qwest's August 28 letter. However, the parties did continue to negotiate terms, conditions, and prices until several days before AT&T filed its complaint.

AT&T is aware that amendments must be executed in order to effect changes to interconnection agreements. Indeed, during the same time period that AT&T and Qwest were negotiating the MDU issues, the parties reached agreement on an amendment regarding

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coordinated cutovers for local number portability. That amendment is attached hereto as Exhibit E.

The only difference between the circumstances that resulted in Exhibit E and the situation in this case is that the parties were able to agree on that amendment in Exhibit E, and were not able to agree on an amendment regarding the issues in this complaint. However, that difference does not support the filing of a complaint as AT&T has in this case. Rather, it simply means that on the one hand, the parties reached agreement through negotiation, and on the other hand, an arbitration may have been necessary to resolve the MDU issues. However, in both cases, an amendment to the interconnection agreement in order to reflect new terms and conditions between the parties is required.

Qwest believes that the material facts in this case are not in dispute, as the only facts which are material to a determination of the issue raised by this motion are whether the parties had an interconnection agreement governing the disputed issues. It is clear that they did not, but were attempting to negotiate such an agreement. AT&T has improperly attempted to circumvent the required negotiation process by filing a complaint premised on alleged state law violations. The Commission should reject such attempts, and direct AT&T back to the negotiating table with Qwest on these issues.

III. STATEMENT OF THE ISSUES

1. Does Qwest have any obligation under the January 29 or July 24, 1997 Interconnection Agreement(s) to provide access to building cable within MDUs or the sub-loop?

2. Does Qwest have any obligation under the Telecommunications Act of 1996 to allow access to building cable within MDUs or sub-loops prior to State commission approval of terms for that access in an arbitrated or negotiated interconnection agreement?

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3. Does Qwest's refusal to allow access on the terms and conditions unilaterally dictated by AT&T violate either state or federal law which prohibits undue preference, unreasonable discrimination or anticompetitive behavior?

IV. EVIDENCE RELIED UPON

Qwest relies upon the pleadings in this matter and the exhibits attached hereto.

V. LEGAL AUTHORITY

The complaint, as framed by AT&T, concerns AT&T's access to the inside wire in certain MDUs. As a justification for bringing the complaint before the Commission in the way that it has, AT&T states that its complaint is premised on violations of various Washington statutory provisions. However, the cited statutes do not establish any obligation on Qwest to allow access to sub-loop elements and do not confer any rights on AT&T in this context. Additionally, the allegations regarding violations of state law are a sham to conceal the true basis for the dispute. AT&T's own introduction to the Complaint shows very clearly that it premises its asserted rights in this complaint on the provisions of the Telecommunications Act and various FCC orders. Indeed, in the second sentence of the complaint AT&T admits that it has been attempting to obtain access to MDUs "*as mandated by the Telecommunications Act of 1996* . . . ." (emphasis added).

The real issue raised by the complaint is the dispute between Qwest and AT&T regarding the terms and conditions, as well as the prices, for sub-loop unbundling. Sub-loop unbundling, as mandated by the FCC in its UNE Remand Order, requires Qwest to allow access to its loop plant at technically feasible points within its network. One of these points may be the building terminal, generally a box on the outside of an MDU. As described in Qwest's Answer to the Complaint, there are certain network configurations where Qwest's loop plant extends all the way into the

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building and terminates inside each individual customer unit. It is those circumstances, i.e., the "Option 3" buildings, in which the issues raised in the complaint arise.

While Qwest does not dispute AT&T's right to access the sub-loop, Qwest does dispute AT&T's claim that it can unilaterally dictate the terms and conditions for that access. AT&T's right to access the sub-loop at the building terminal is based solely on the FCC's UNE Remand Order.[1]

In the Local Competition First Report and Order[2], the FCC declined to require incumbents to unbundle subloops. The FCC revisited this issue in the UNE Remand Order, however, and concluded that where it is technically feasible to do so, the incumbent LECs must provide unbundled access to subloops on a nationwide basis. UNE Remand Order at ¶ 205.

The FCC defined subloops as those portions of the loop that are accessible at terminals in the incumbent's outside plant – i.e., "where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within." Id. at ¶ 206. The Commission further defined such accessible terminals to include: (1) any technically feasible point near the customer premises, such as the pole or pedestal, the NID, or the minimum point of entry to the customer premises ("MPOE"); (2) the feeder distribution interface ("FDI"): which might be located in the utility room in a multi-dwelling unit, in a remote terminal, or in a controlled environment vault "CEV"); and (3) the main distribution frame in the incumbent's central office. Id.

The FCC established a "rebuttable presumption that the subloop can be unbundled at any accessible terminal in the outside loop plant." Id. at ¶ 223. Thus, if the incumbent and CLEC

[1] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order*, FCC 99-238 (rel. Nov. 5, 1999).

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cannot reach an agreement pursuant to voluntary negotiations about the availability of space or the technical feasibility of subloop unbundling at a given location, then the incumbent will bear the burden of demonstrating to the state, *in the context of a section 252 arbitration proceeding*, that there is no space available or that it is not technically feasible to unbundle the subloop at the requested point (emphasis added). Id.

With respect to multi-unit premises FCC encouraged parties to cooperate in creating a single point of interconnection at such multi-unit premises. Id. at ¶ 225-26. Where the parties cannot agree upon such a single point of interconnection, however, the FCC required the "incumbent to construct a single point of interconnection that will be fully accessible and suitable for use by multiple carriers," regardless of whether the incumbent controls the wiring on the customer premises. Id. at ¶ 226 & n. 442.

Thus, the right to access the sub-loop is clearly premised on the FCC's UNE Remand Order, and in that order the FCC has clearly held that disputes on issues regarding access to the sub-loop must be resolved in the context of a Section 252 arbitration proceeding under the Act. UNE Remand Order at ¶¶ 223, 229.

The Telecommunications Act, in Section 252, establishes a detailed schedule for negotiation and arbitration of terms and conditions in an interconnection agreement. Additionally, it is clear that the terms and conditions under which an incumbent LEC fulfills its requirements under Section 251 of the Act must be contained in such an interconnection agreement. Specifically, Section 251(c)(1) imposes on both carriers the duty to negotiate in good faith the particular *terms* and *conditions* of *agreements* to fulfill the duties described in subsections (b) and

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[2] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325 (rel. Aug. 8, 1996).

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(c) of Section 251. Thus, it is clear that the terms and conditions under which Qwest fulfills its obligation to provide access to unbundled network elements (which is what is specifically at issue in this case) must be contained in an *agreement*.

A. Access to MDUs and Sub-loops.

The complaint is essentially a complaint under the Telecommunications Act of 1996 (the Act), alleging that Qwest's proposed terms and prices for access to a particular unbundled network element (UNE) violate the Act and the FCC's requirements. However, the only proceeding in which AT&T may properly seek to resolve this type of dispute under the Act is through a petition for arbitration under Section 252, or, alternatively, a petition for enforcement of an interconnection agreement if the agreement between the parties already addresses the issues in dispute. Here, it is undisputed that the UNE that AT&T seeks to access is not covered by the interconnection agreement between the parties. Further, AT&T has failed to comply with the requirements of the Act to negotiate the issues in good faith, and has failed to comply with the procedural requirements regarding a petition for arbitration.

The essential allegation in AT&T's complaint is that Qwest's refusal to allow AT&T to access the building cable within MDUs through direct connection to Qwest building terminal boxes as unilaterally mandated by AT&T is a violation of either state and federal law. In addressing this question, Qwest reiterates the arguments set forth in its answer and affirmative defenses of November 28, 2000. There, Qwest argued that because AT&T is asking for relief available to it solely under the Act and FCC rules, it must use the mandated process of negotiating and then arbitrating and agreement under the Federal Telecommunications Act. AT&T cannot rely upon any other process for obtaining access to sub-loop elements.

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Because the agreement(s) that were effective between the parties at all times material to the allegations raised in this complaint did not provide for access to MDU building cable or to these sub-loop elements, Qwest had no obligation to do so. Qwest's obligation to provide carrier-to-carrier services, if such obligation arises under the Telecommunications Act of 1996, is an obligation which becomes effective only upon the effective date of an agreement approved by the State commission.[3]

This Commission considered a similar complaint, almost three years ago, and decided that the rights and obligations of the parties were established by the interconnection agreement in effect between the parties at the time, and that disputes should be resolved by arbitration, not complaint. In *MCImetro Access Transmission Services, Inc., v. U S WEST Communications, Inc.*, Docket No. UT-971158, the Commission rejected MCI's claim that U S WEST was obligated under state law to accept test orders for UNEs when MCI's interim interconnection agreement did not contain terms and conditions addressing test orders. (Order Granting Motion for Summary Determination, February 19, 1998).

In that proceeding, MCI filed a complaint against U S WEST, alleging, much as AT&T does here, that it had an independent statutory entitlement under various provisions of state law to have U S WEST perform in a certain manner. The Commission noted that its important powers under state law were not diminished by the Commission's policy that the respective rights and obligations of parties seeking interconnection of their networks should be controlled by a contract. The Commission further stated that disagreements over the details of interconnection agreements

[3] See, Section 252(c)(3) requiring an implementation schedule in any arbitrated agreement, and 252(e) requiring Commission approval of agreements.

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should be resolved through arbitration consistent with Section 252 of the Telecom Act. (*See,* Order Granting Motion for Summary Determination, page 7).

The facts in that case were virtually identical to those here. In both cases CLECs have come to the Commission and asked the Commission to circumvent the negotiation and arbitration process carefully laid out by the Act. In the MCI case, the Commission wisely chose to direct the CLEC back to the federally mandated process under Section 252 of the Act. The result should be the same in this case.

B. State and Federal Law

AT&T claims that specific state statutes were violated in this complaint. Qwest believes that the Commission should conclude as a matter of law that no violations have been established in this matter.

AT&T cannot point to any state law authority which would enable it to purchase unbundled network elements absent a specific contract with Qwest to do so. In fact, the Commission recognized, in the original interconnection docket (UT-941464, et al.) that carriers would enter into contracts or agreements with one another for interconnection, and for the purchase of unbundled network elements. At the time that this complaint was filed, Qwest and AT&T were parties to two such agreements which was approved by the Commission and effective in January and July 1997. The agreements did not address sub-loops or access to MDUs, except to direct AT&T to make a bona fide request if access were requested under the AT&T agreement. AT&T never did so, and indeed acknowledged that its TCG agreement should be amended to incorporate terms and conditions for access. Qwest was at all times willing to negotiate terms and conditions for such access. As discussed above, in August 2000, Qwest sent AT&T a proposed amendment to the interconnection agreement which would have established those terms and

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conditions. Qwest was also at all times willing to negotiate specific terms with AT&T. Thus, there can be no suggestion that Qwest was under any obligation, under either state or federal law, to provide AT&T with access to the sub-loop element prior to the effective date of an agreement governing the same.

MCI, in its complaint in Docket No. UT-971158, cited many of the same provisions in support of its claim that AT&T does here, including RCW 80.04.110 (complaints); 80.36.080 (adequate and sufficient facilities); 80.36.140 (Commission may order adequate and sufficient facilities); 80.36.170 (Commission may remedy undue preference or advantage); and 80.36.186 (Commission may order access on equal terms).

AT&T suggests that RCW 80.36.080, which requires adequate and sufficient facilities, and RCW 80.36.140, which allows the Commission to order adequate and sufficient facilities, are violated by Qwest's failure to provide access under the terms and conditions unilaterally mandated by AT&T. Qwest believes that the facts as established in this matter do not show that Qwest has failed to provide adequate and sufficient facilities. The facts simply establish that AT&T has not properly ordered or been entitled to the services it has requested.

AT&T also suggests that RCW 80.36.170, which allows the Commission to remedy an undue preference or advantage, may have been violated in this matter. However, the facts as alleged by AT&T entirely fail to establish that any carrier, including Qwest itself, was given an advantage or preference by Qwest's treatment of AT&T. Qwest has provided service to those customers and carriers who were reasonably entitled thereto, including as a prerequisite the existence of a valid contract for the provision of those services. This same analysis also addresses the argument that Qwest engaged in anticompetitive behavior, a ridiculous argument. Qwest has simply required that carriers ordering services from it be in compliance with the federal

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requirements that an interconnection agreement and an agreement governing access to the UNEs a carrier is requesting be in place prior to fulfilling any orders for those services. This behavior is not anticompetitive, rather, it places all of the competitors on equal ground in requesting services and facilities from Qwest.

VI. CONCLUSION

Based on the evidence presented in this case, Qwest believes that the allegations raised in the complaint fail to state a claim upon which relief can be granted and that Qwest is entitled to a summary determination in this matter and is entitled to judgment as a matter of law.

Specifically, the Commission should determine that absent an approved interconnection agreement providing for access to the sub-loop (specifically at MDUs), Qwest was under no obligation to provide that access. The Commission should dismiss the complaint, and direct AT&T to pursue negotiations with Qwest under the Act.

Respectfully submitted this 11th day of January, 2001.

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be filed with the FCC via its Electronic Comment Filing System, (1) a copy of the **REPLY COMMENTS** to be served, via hand delivery on all parties marked with an asterisk (*), and (2) a copy of the **REPLY COMMENTS** to be served, via First Class United Stated mail, postage pre-paid, on all other parties listed on the attached service list.

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February 21, 2001

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